Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

FILED
Dec 09 2010, 9:17 am
CLERK
of the supreme court, court of appeals and tax court

ATTORNEY FOR APPELLANT:

LEANNA WEISSMANN
Lawrenceburg, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

ANDREW R. FALK
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

DONALD LEE SMITH,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 16A05-1006-CR-360
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DECATUR SUPERIOR COURT
The Honorable Matthew D. Bailey, Judge
Cause No. 16D01-0810-FD-547

December 9, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Donald Smith appeals the revocation of his probation before the probationary period began and before he had been to his intake interview or signed the conditions of probation. We affirm.

FACTS AND PROCEDURAL HISTORY

Smith agreed to plead guilty to possession of methamphetamine and was sentenced to one year on home detention and two years suspended to probation. At sentencing he signed a statement consenting to a drug screen at any time and acknowledging a positive result would be a basis for revocation of probation. His home detention agreement provided he would not use illegal drugs.

Before he finished home detention Smith tested positive for methamphetamine and the trial court revoked both the in-home detention and Smith's probation.

DISCUSSION AND DECISION

Ind. Code § 35-38-2-3 provides in pertinent part:

> The court may revoke a person's probation if . . . the person has violated a condition of probation *during the probationary period* . . . . If the court finds that the person has violated a condition at any time before termination of the period, and the petition to revoke is filed within the probationary period, the court may . . . [o]rder execution of all or part of the sentence that was suspended at the time of initial sentencing.

(Emphasis added.)

Despite that statutory language, our Indiana Supreme Court has explicitly held "[p]robation may be revoked at any time for a violation of its terms. This includes revocation prior to the start of probation." *Champlain v. State*, 717 N.E.2d 567, 571 (Ind. 1999). *See*

also Childers v. State, 656 N.E.2d 514, 518 (Ind. Ct. App. 1995) (finding the language "at any time" permits a trial court to revoke probation before the defendant enters the probationary phase of his sentence), *trans. denied*.

In *Johnson v. State*, 606 N.E.2d 881 (Ind. Ct. App. 1993), Johnson had been sentenced to the Department of Correction for five years, with three years suspended and two of those years on probation. Johnson's first year would be served at the Department of Correction and the second year at the DuComb Center. When Johnson arrived at the DuComb Center he was read the rules of the Center, which required that he obtain permission before leaving the Center. He acknowledged that he understood the rules, but he violated that one. The trial court revoked Johnson's placement at the DuComb Center and committed him to the Department of Correction to serve the remainder of his five-year sentence.

Johnson claimed the trial court exceeded its authority when it revoked his probation for conduct occurring before the probationary period started. We noted the language "at any time" permits a trial court to revoke probation before the defendant enters the probationary phases of his sentence, Johnson was fully aware of the rules of the DuComb Center, and he admitted fleeing in violation of those rules. *Id*. at 882. We held the trial court did not abuse its discretion in revoking Johnson's placement at the Center and his probation. *Id*.

Smith, like Johnson, was fully aware of the home detention rule prohibiting the use of illegal drugs and he knew a positive drug test would be a basis for revocation of his probation. It was not an abuse of discretion to revoke Smith's probation before the

probationary period began. We accordingly affirm.

Affirmed.

ROBB, J., and VAIDIK, J., concur.